have the originals or photostat copies in order for him properly to prepare his defence, which could not otherwise be prepared, it seems to me that the Public Prosecutor in order to ensure that justice was not only done but seen to be done should not have raised objections, on the particular facts of this case, to the defence being supplied with photostat copies of the letter and the cheque and also any other documents removed from his possession which he required for the furtherance of this defence, for example a letter or letters in the handwriting of the complainant."

The learned deputy opposed this application as it was not the practice for the prosecution to allow the accused and/or his counsel to have sight of any article before it was produced in court as an exhibit. Regarding the case cited by applicant's counsel he submitted that the facts in that case were entirely different from those in this case. He also submitted that the application was not necessary as the applicant and/or his counsel or his potential expert witness could have sight of the article and have it examined if necessary at an early stage of the trial when it would be produced as an exhibit.

There was no statutory provision by which the prosecution could be compelled to accede to the request of the applicant and since it was also not the practice the court must be satisfied that it was really essential in the interest of justice before it would compel the prosecution to do so. In the case referred to by the applicant's counsel where the accused was charged with two offences under section 465 of the Penal Code and the defence was that the signatures were in fact the signatures of the complainant Hepworth J. considered that it was essential for the accused to have a copy of the relevant documents to properly and fully prepare his defence. The facts in that case were different from those in this case where the applicant was charged with an offence under section 3(1) of the Arms Act, 1960, with possession of a pen-type pistol, allegedly an "arm" as defined in section 2 of the said Act and part of his defence as indicated in the two affidavits was that the article was not or appeared to be such that he did not know that it was an "arm". On the basis that those were the specific instructions he had given to his counsel I was not satisfied that it was really essential for him, his counsel or potential expert witness to have sight of or inspect the article first before a proper and full defence could be prepared by his counsel. The article would certainly be produced as an exhibit at an early stage of the trial and if necessary a short adjournment could be asked for to enable him, his counsel or expert witness to inspect it for purposes of substantiating his defence.

I therefore dismissed the application.

Application dismissed.

Solicitors: *Jega & Co.*

LEE WONG TIANG v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 11, 1971]

[Kuala Lumpur — Federal Court Criminal Appeal No. 27 of 1970]

Penal Code, ss. 85 and 86 — Murder — Defence of drunkeness — Unsworn statement — Comment by trial judge — Appeal against conviction — No merit or substance in appeal.

The appellant appealed against his conviction on a charge of murder. The defence of the appellant at the trial was that he did not know what he was doing because of intoxication. The appellant made a statement from the dock and a psychiatrist was called on his behalf. On appeal it was alleged that the summing up of the trial judge was more favourable to the prosecution than to the defence.

Held, dismissing the appeal: there was no merit or substance in the appeal. There was also no misdirection in the summing up of the trial judge.

FEDERAL COURT.

S. K. Lee for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Azmi L.P.: The appellant was convicted of murder and sentenced to death. The prosecution case against him was that he intentionally caused the death of a young woman Esther Chen in his house at Pontian on the night of July 6, 1969. The evidence relied upon in proof of this was largely circumstantial and the facts thereby established were as follows:

On May 31 the deceased transferred to the appellant all her coconut land about 100 acres in area. The deceased, unmarried, lived in her own house in Batu Pahat. The appellant lived with his wife and children in a house in Pontian. His friends and neighbours, all school teachers, lived in a house nearby. It would appear from the evidence that on the morning of July 6 the deceased was in Pontian and that sometime during the day she was seen with the appellant. This was admitted by the appellant in his statement from the dock. One of the school teachers had stated in evidence that he saw the figure of a woman entering the appellant's house at about 7.00 p.m. Early on the morning of July 7, Esther Chen was found dead on the roadside between Pontian and Batu Pahat. The appellant was arrested three days later. In the meantime the police discovered the identity of the deceased from the younger sister who had come from Singapore to keep an appointment with the deceased to discuss the younger sister's share in the land which had been transferred to the appellant. There was also incriminating evidence suggesting that having killed the deceased in his house the appellant took the body in his car to the spot where it was later found.

The accused did not deny the killing. His defence was that he did not know what he was doing by reason of intoxication. It was a defence under sections 85(ii)(b) and 86(ii) which provide as follows: —

"85(i)....

(ii) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was do-

ing and—

(a) ....

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

86(i)....

(ii) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."

The appellant elected to make a statement from the dock. It was a long statement by reason of the fact that he had to read it out from a prepared document of about 32 pages. In his defence he said he drank a glassful of the intoxicating concoction from the wine jar in his house. The concoction was meant for his wife when she gave birth to their child. It was a mixture of brandy, Chinese liquor or wine, herbs and iguanas. He said he took the drink because he was feeling sad, miserable and lonely. He described his condition after the drink in these words:

"I remember my head began to swim. I tried to read newspapers but what I saw was a blur. I remember feeling sick and wanting to vomit. I then remembered someone shaking my shoulders. I vaguely realised the deceased was near me and embracing me. I remember pushing her away. I remember the deceased raised her voice and said something frightening to me. My head was aching. I then remembered tottering on my unsteady feet. My hair was pulled and I vaguely recalled lashing out. The next thing I remember was coming round on the cold and wet floor of the bathroom with the deceased lying very near me. I struggled to rise and managed to stand on my feet leaning against something. Gradually I realised something serious had happened. I made a great effort to pull myself together. I remember vomiting and collapsing. I next recall washing myself. The water was cold. I then felt less confused and I could see more clearly. I noticed my clothes were wet and bloodstained. I remember fumbling around and changing into something dry. I wanted to get on to my mother and seek help. I vaguely recall Tan Bin Choo driving me and Soo Tian Seng to my mother in Batu Pahat. I remember telling them what I felt had happened."

The psychiatrist called on his behalf has suggested the probability that the appellant was pathologically drunk meaning temporarily insane, when he committed the act. The expert based his opinion on the assumed facts that the appellant was not used to drink, he was feeling sad and miserable, and also the possibility that he was suffering from brain injuries as a result of accident sometime before. Opinion evidence in rebuttal by the psychiatrist called for the prosecution was to the effect that there was no sufficient evidence to support the probability that the appellant was suffering from pathological drunkeness or temporary insanity. At the conclusion of the trial which lasted about a month, the jury unanimously found the appellant guilty of murder.

In this appeal the complaint has been directed almost entirely against the summing up of the trial judge. Generally put, the complaint is that the summing up was more favourable to the prosecution than to the defence. Although the petition of appeal had particularised 11 grounds, counsel for the appellant decided to argue under 6 general heads as follows:—

(1) that the trial judge failed to put the defence case adequately to the jury;

(2) the trial judge's comments and views on the facts were prejudicial to the defence;

(3) the direction on the burden of proof was inadequate;

(4) certain evidence admitted at the trial was hearsay;

(5) the trial judge's comments on the appellant's election not to give evidence on oath was so unfair and prejudicial that it amounts to a misdirection.

(6) Miscellaneous.

Several authorities were cited to support the various aspects of counsel's argument. We have considered all these and have come to the conclusion that there is no merit or substance in this appeal. We wish, however, to refer to certain points raised by counsel in his submission.

On the submission that the trial judge failed to adequately put the defence case to the jury, the point raised was that the appellant's statement suggesting that he had no motive for gain in killing the deceased was not sufficiently or adequately put to the jury. Counsel had submitted that the trial judge should not only read out the relevant part of the statement but that he must also inform the jury the effect of the statement. His Lordship did not read out the written statement in full because, he said, there was no need for him to do that. No need because the accused has already read it all out and because accused's counsel has repeated most of it in his closing address. But counsel said, if the statement had been read out and its effect explained to the jury in the way counsel would want it to be done, the jury, if satisfied that the appellant had no motive for gain, would probably have found that he was insane. The logic of counsel's argument is not easy to understand. In our view the question whether or not there was motive for the crime was a matter which the jury had to infer from the evidence before them, sworn or unsworn. The trial judge could only suggest whether or not there was motive and if he had done that he would be merely expressing his own view. He was not bound to express any view if in his opinion it was not necessary to do so. But counsel for the appellant submitted that it was necessary for the trial judge to express his view on the appellant's statement because it was vital to the defence case. Counsel, of course, was entitled to say that. But the point is: is there any serious misdirection in the summing up which can be fatal to the conviction. We are satisfied that there was no such misdirection. We have come to this conclusion upon reading the summing up as a whole.

The trial judge's comments on the facts have also been criticised on the ground that they were prejudicial to the defence. The trial judge should not assume the role of prosecution counsel when commenting on the facts. Impartiality is the key word in the administration of justice. We can find no evidence of partiality in this case and we cannot accept counsel's criticism of certain passages in the summing up.

Another passage in the summing up complained of as a misdirection reads:

"If on considering all the evidence you are satisfied that the accused was so drunk at the time that he had no intention to kill the deceased you return a verdict of guilty of culpable homicide not amounting to murder *i.e.* manslaughter."

Counsel has submitted that this was a misdirection or non-direction on the burden of proof. In our view it has nothing to do with the burden of proof. Section 86(ii) of the Penal Code requires evidence of intoxication to be taken into account in the consideration of the question of intent. The passage just referred to required the jury to consider the evidence of intoxication before the court. They were told that if, on the evidence, they were satisfied that the appellant was so drunk as to be incapable of forming the necessary intent to kill they should return a verdict of culpable homicide not amounting to murder. That was a direction on the law. Elsewhere the jury had been told the comparative extent to which they have to be satisfied in relation to the prosecution case and in relation to the case for the defence. They have been told that if they entertained any reasonable doubt the benefit of such doubt should be given to the accused. We cannot find any substance in this complaint.

The objection against hearsay evidence was not seriously pressed as counsel was not sure if he was on strong ground. We have considered the objection and have come to the conclusion that even if there was any misreception of evidence it cannot materially affect the appellant's conviction.

Another ground of appeal is that the trial judge's comments on the appellant's decision to make an unsworn statement was a misdirection. The passage singled out as an instance reads as follows: —

"Now let us look at the defence. The accused chose to make a statement from the dock. It was within his legal rights to do so. It is not sworn evidence which can be cross-examined to and which will give the prosecution a chance of testing its credibility. Nevertheless, you can attach to it such weight as you think fit. You must take it into consideration in deciding whether the prosecution have made out their case so that there is no reasonable doubt."

We are unable to find anything in this passage which can amount to a misdirection. Unlike prosecuting counsel a trial judge is entitled to make such comment as he may think right and proper in the interest of justice but it must not exceed the limit of fair comment by suggesting, for instance, that the statement is not true or that the accused is a liar simply because he did not make a statement on oath. This ground of appeal also fails.

Under "miscellaneous" counsel has referred to various other passages in the summing up and criticised them on grounds similar to those which have already been considered. We are unable to find any valid ground for the criticisms.

We would conclude by saying that on the evidence before the trial court, as a whole, the appellant has been rightly convicted of murder. We uphold the conviction and confirm the sentence of death.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *S. K. Lee & Co.*

CHINA INSURANCE CO. LTD. v. NGAU AH KAU

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) September, 24, 1971]

[Alor Star — Federal Court Civil Appeal No. 106 of 1970]

Insurance — Motor — Repudiation of policy — False answers given in proposal form — Whether oral evidence can be given to contradict written evidence — Materiality of answers — Whether insurance agent helping to fill up proposal form agent of the insurer or the company.

Contract — Agreement in writing — Insurance policy — Questions and answers in — Whether made condition of policy.

Evidence — Admissibility — Oral evidence — Evidence Ordinance, 1950, ss. 91 and 92.

The plaintiff/respondent had claimed to be indemnified for the loss of his car. The defendant/appellant company did not dispute the theft but resisted the claim on the ground that the plaintiff in his proposal form had made a declaration false in several aspects. In answer to the questions whether he had made a claim under any motor vehicle policy he had said "no"; and in answer to the question whether he was or had been insured in respect of any other vehicle he gave the name of another insurance company. The plaintiff had in fact made a claim but this was more than three years prior to the proposal and he had said he had been advised by the agent that he need not disclose this. Also he left it to the agent to put in the name of the defendant in answer to the second question. The learned trial judge after hearing the evidence of the plaintiff and the agent held that the answers to the questions were not material. On appeal,

Held, allowing the appeal (Azmi L.P. and Ali F.J., Suffian F.J. dissenting): (1) the answers to the questions had become terms of the contract of insurance and by reason of sections 91 and 92 of the Evidence Ordinance it was not open to the plaintiff to adduce oral evidence to contradict, vary or add to or subtract from them;

(2) the truth of the answers had been made a condition of the policy and it was not open to the trial judge to consider the question whether the answers to these questions were material or not.

Cases referred to:

(1) *Zurich General Accident and Liability Insurance Co.* v. *Morrison & Ors.* [1942] 2 K.B. 53 at p. 60.

(2) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356; [1929] All E.R. Rep. 442.

(3) *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516.

(4) *Dawsons Ltd.* v. *Bonnin & Ors.* [1922] All E.R. Rep. 88.

(5) *Joel* v. *Law Union and Crown Insurance Co.* [1908] 2 K.B. 863.

(6) *Locker and Woolf Ltd.* v. *Western Australian Insurance Co.* [1936] 1 K.B. 408.

(7) *Condogianis* v. *Guardian Assurance Co. Ltd.* [1921] 2 A.C. 125, 129.

(8) *Glicksman* v. *Lancashire & General Assurance Co. Ltd.* [1926] All E.R. Rep. 161.

(9) *Barrett Brothers (Taxis) Ltd.* v. *Davies* [1966] 1 W.L.R. 1334.

(10) *Thomson* v. *Weems* (1884) 9 App. Cas. 671.

FEDERAL COURT.

Lim Kean Siew for the appellants.

O. L. Phipps (*Triptipal Singh* with him) for the respondent.

Cur. Adv. Vult.

Azmi L.P.: By a policy of motor insurance between them, the defendant company agreed to in-